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Washington Federal Court Upholds Validity of Washington Defense Cost Endorsement Allowing Insurer to Obtain Reimbursement of Defense Costs for Uncovered Claims

By Margaret Van Valkenburg, Matthew J. Sekits

Six years ago in *Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 297 P.3d 688 (2013), the Washington Supreme Court concluded that, unless a right to reimbursement of defense costs was affirmatively included in the language of an insurance policy, an insurer did not have a right to be reimbursed monies paid in defense of its policyholder, even if the insurer defended under a reservation of rights – including the right to reimbursement – and the court ultimately determined the insurer had no duty to defend.

In response to the *Immunex* opinion, the Insurance Services Office developed a Defense Cost endorsement expressly giving issuing insurers a right to reimbursement of fees and costs paid in defense of their policyholders, under certain conditions. Recently, in *Massachusetts Bay Insurance Company v. Walflor Industries, Inc.*, 2:18-cv-00791-JLR, 2019 WL 1651659 (April 17, 2019), the United States District Court for the Western District of Washington held that the Defense Cost endorsement should be enforced as written and granted the plaintiff insurer summary judgment on its right to be reimbursed the monies paid in defense of its policyholders.

In *Walflor*, the insurer agreed to defend its policyholders under a reservation rights, including the right reimbursement of defense costs paid, should it be determined that it had no duty to defend. The relevant policy contained a Defense Cost endorsement providing as follows:

If we initially defend an insured or pay an insured's defense but later determine that none of the claims, for which we provided a defense or defense costs, are covered under this insurance, we have the right to reimbursement for the defense costs we have incurred.

The right to reimbursement under this provision will only apply to the costs we have incurred after we notify you in writing that there may not be coverage and that we are reserving our rights to terminate the defense of the payment of defense costs and to seek reimbursement for defense costs.

The insurer quoted the endorsement in its reservation of rights letter to its policyholders and brought a declaratory judgment action seeking a judgment that it had no duty to defend them and had a right to reimbursement of defense costs paid.

The court rejected the policyholders' argument that the operative complaint should be read to allege claims for covered personal and advertising injury offenses, concluding the claims as alleged in the complaint clearly fell outside the coverage of the policy and, therefore, the insurer had no duty to defend.

The court also concluded there was no public policy reason why the Defense Cost endorsement should not be enforced as written or, in the alternative, that the court should certify the interpretation of the endorsement to the Washington Supreme Court. The District Court denied the request for certification, holding that it found "sufficient guidance in the prior decisions of the Washington Supreme Court to resolve this issue." Next, the court rejected the argument that the language of the *Immunex* ruling precluded reimbursement both when an



insurance policy was silent on the issue and when it expressly provided for reimbursement, as did the relevant policy. The court noted that *Immunex* "narrowly defined the issue before it as 'whether [an] insurer may *unilaterally* condition its reservation of rights defense on making the insured absorb the defense costs if a court ultimately determines there is no coverage.'" (Emphasis by court.) Finally, the *Walflor* court found "no basis for invalidating the endorsement on public policy grounds." The court concluded that the insurer was entitled to recoup the defense costs it paid to defend its policyholders in the underlying lawsuit.

The ISO Defense Cost endorsement (BP 06 12 11 13) has been added to many insurance policies applying to losses in Washington State. We anticipate seeing more courts enforce the plain language of the endorsement and allow insurers, who accede to their policyholders' demands for a defense, even when no covered claim is alleged, to obtain reimbursement of defense costs paid.